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# The Executioners Sing

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# The Executioners Sing

**I**n the United States, the jury system is becoming a matter of controversy. Most Americans still support the basic concept of the jury trial, especially in criminal cases, believing juries composed of average citizens to be an important bulwark against the potential tyranny of government. At the same time, widely publicized cases like the Menendez case, the Hattori case, the two Rodney King trials, and now the O.J. Simpson case, have led many Americans to question whether juries can be trusted to make wise decisions. Emotional arguments by lawyers, pressures from the mass media and personal disagreements within the jury room often seem to distort jury decision making.

Unfortunately, much of the debate about the jury system has taken place in the dark, because juries conduct their business in a "black box." No one else is allowed in the jury room during deliberations. More than 30 years ago, the Chicago Jury Project, headed by Harry Kalven, Jr., and Hans Zeisel, tried to observe juries by using hidden cameras and microphones. This part of their research was quickly banned, however, and ever since, researchers have been unable to study jury behavior by direct observation.

In the absence of direct observation, jury research has relied largely on either "mock jury" studies (using volunteers, often, who pretend to be jurors in a real or imaginary case) or inferences about jury behavior from the end results of actual cases. These methods have produced important knowledge about juries, providing an empirical foundation for the theoretical work of Phoebe Ellsworth, Shari Seidman Diamond, Valerie Hans, Reid Hastie, Nancy Pennington, Vicki Smith and other leaders in jury research. Yet these methods often seem to be missing a crucial connection with the "real world" of jury decision-making. Jury researchers have lacked the opportunity to learn,

as Kalven and Zeisel tried to do, what really happens in the jury room.

The Capital Jury Project is an attempt to fill this research gap in the specific context of death-penalty trials. Death-penalty trials are certainly the most important cases that a jury is ever asked to decide -- they involve, quite literally, a matter of life and death. I will begin by explaining some of the basic procedures of an American-death penalty trial. Then I will describe the Capital Jury Project and its methodology. Finally, I will report some of the interim findings of the Capital Jury Project.

## American Death-Penalty Cases

There are both similarities and differences in the basic procedures that are used in an average American criminal trial and in the trial of a death-penalty case. One important difference is in the selection of the jury. In an average criminal trial, jury selection involves identifying any potential jurors who might have prior knowledge about the case, or who might have a relationship with one of the parties; often, it takes only a few minutes to select a jury.

In a death-penalty trial, on the other hand, any person whose personal views about capital punishment are strong enough to substantially influence his or her behavior as a juror is excluded from service. In other words, each potential juror must be capable of giving fair and full consideration to both a life sentence and a death sentence. This legal standard creates an opportunity for the lawyers to battle over each potential juror, based on their feelings about whether the potential juror is likely to favor one sentence over the other. For this reason, jury selection in a death-penalty case often takes several weeks; during that period, potential jurors are probed for their views about capital punishment, before they have even begun to hear any evidence about whether the defendant committed the crime.

After the jury is finally selected, the next part of an American death-penalty trial -- which is called the "guilt phase" of the trial -- proceeds much like any other criminal trial. The prosecution presents its case first, followed by any evidence that the defense wishes to present. The defense need not present

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*Joseph L. Hoffmann*, Professor of Law, Indiana University, is an award-winning scholar and law teacher. This piece is excerpted from an article that appears in Hugo Adam Bedau's book about the death penalty in America.

any evidence at all; the prosecution must always bear the burden of convincing the jury, beyond a reasonable doubt, that the defendant is guilty of the crime. The defendant need not take the stand as a witness, and no inference of guilt may be based on the defendant's silence in the courtroom. The trial judge is a largely passive observer of the proceedings, ruling on procedural matters but otherwise letting the jury make up its own mind based on the evidence and the arguments of the lawyers. After the close of evidence and arguments, the jury receives instructions from the judge and then retires to the jury room to deliberate, in private, about the defendant's guilt.

In the average criminal trial, if the defendant is found guilty, then the jury's role is over. The trial judge reads the jury's verdict aloud in open court, the jury is dismissed, and the case is scheduled for a sentencing hearing at a future date. The trial judge then determines an appropriate sentence for the defendant (within the range set by the statute) after receiving information about the defendant's background and circumstances.

In a death-penalty case, however, the guilt phase of the trial is only a prelude to the main event. In most instances, a prosecutor will not ask for the death penalty unless the evidence of the defendant's guilt is quite strong. Therefore in a death-penalty case, it is often a foregone conclusion that the defendant will be found guilty by the jury.

After the guilt phase of a capital trial, the trial reconvenes for what is called the "sentencing phase." This phase is basically a separate trial, except that the same parties, the same trial judge, and (in most states) the same jury are still involved. At the guilt phase of the trial, the jury is told to focus only on whether or not the defendant committed the crime. At the sentencing phase, the defendant's guilt is no longer the issue; the only question is whether or not the defendant should receive the death penalty. In all but two of the states where the death penalty exists, the same jury that decided the defendant's guilt must go ahead and try to reach a verdict (either final or advisory, depending on the state) about whether the defendant should live or die.

Although the guilt phase and the sentencing phase of a capital trial may seem to be similar in their basic procedures, they are quite different in substance. The most important difference is in the role of the jury. In the guilt phase (as well as in an average criminal trial),

the jury's role is to be the finder of fact. The jury decides who is telling the truth, and what really happened. There is (at least in theory) a true story about what happened, and maybe one or more false stories. It is the jury's fundamental role to determine the truth.

At the sentencing phase of a capital trial, on the other hand, the jury is no longer deciding a question that has a true or false answer. Instead, the jury is being asked to decide a moral question that has no true or false answer: is the defendant a person who deserves to live or to die?

This is not a question of fact, but one of moral judgment. There are no rules for making this kind of decision, and the law gives the jury no definitive guidance. The prosecution presents its evidence in support of a death sentence, usually emphasizing the brutality of the defendant's crime; and the defense presents its case for mitigation, usually trying to explain how the defendant came to be the kind of person he is. The trial judge instructs the jurors about the factors to consider, but in the end, the jury is told to exercise its sound discretion and do whatever it believes to be just. If the jury unanimously votes for a death sentence, then (in most states) the trial judge must impose such a sentence. A judge's power to override the jury's sentencing verdict is (in most states) extremely limited.

### **The Capital Jury Project**

In 1990, a group of researchers from over a dozen different American universities in the widespread fields of law, sociology, political science, psychology, and criminology came together to begin a research project to interview jurors who had served in death-penalty cases. The Capital Jury Project is being funded by the National Science Foundation of the U.S. Government. We are now near the end of our data collection, and we will soon have completed over one thousand juror interviews.

The Project is underway in more than a dozen states, representing more than one third of the states where the death penalty exists. The states were chosen in order to permit useful comparisons based on different kinds of death-penalty statutes, as well as regional and demographic variations. Within each state, our sample includes all recent cases in which a jury was asked to decide whether or not to impose a death sentence; half of our interviews come from cases in which the jury voted for life, and half come from cases in which death was imposed. We interviewed at least three ju-

rors in each case.

The interviews, which are all based on the same data collection instrument and protocol, cover the entire experience of the juror, from the jury selection phase through the juror's emotional reactions after the trial ended. The interviews are audiotaped, and range in length from two to eight hours. The interview data is being entered into a computer for quantitative analysis, and the audiotapes are providing rich material for qualitative analysis.

### **Interim Findings**

As an original member of the Capital Jury Project, with responsibility for the Project in my home state of Indiana, I am glad to have this chance to report some of the Project's interim findings. The quantitative findings I will report are based on the completed sets of juror interviews from seven states; I will also refer to qualitative information from juror interviews in other states, where data collection is still ongoing.

My report will focus on two areas of interest. First, what specific factors exert the greatest influence on jurors as they try to decide whether the defendant should live or die? Second, how do jurors feel about the responsibility they bear for the fate of the defendant, and how do those feelings affect their behavior?

### **Factors That Influence the Sentencing Decision**

Perhaps the most important question that we hope to explore is the question of what specific factors most strongly influence the jury's sentencing decision. Because the jury is not given a rigid legal formula for the decision, but is free to exercise discretion, we are curious about the factors that determine whether a defendant lives or dies. We hope eventually to develop tentative models of jury decision-making in capital cases, which may also help us understand jury decision-making in other kinds of cases.

So far, several observations can be made about this subject. The most extensive analysis has been conducted by Theodore Eisenberg of Cornell University, who supervised the juror interviews in South Carolina, and his research colleague Martin Wells. They found that one of the most important issues for jurors -- more important than such factors as the defendant's criminal history, background and upbringing, and remorse -- is whether the defendant, if he is allowed to live, is likely to pose a danger to society in the future. Most states provide for either life imprisonment or a

very long term of years in prison (for example, 50 years) as the alternative to a death sentence. In many states, however, the jury is not told about the nature of these alternative sentences. Therefore, the impact of the factor of "future dangerousness" depends on what jurors believe -- rightly or wrongly -- about the likelihood that a defendant who is not sentenced to death will remain in prison for a long time.

Over 60 percent of the jurors we interviewed reported discussing this factor "a great deal" or "a fair amount" -- *even during the guilt phase deliberations*, at a time when they were not supposed to be thinking about the defendant's sentence at all. Nearly 65 percent also reported discussing their feelings about the right punishment during the same guilt phase deliberations.

Under the law of almost all states, a jury is never required to impose a death sentence on a defendant; the trial judge instructs the jury that the proper sentence in a capital case is *always* a matter of jury discretion. Yet 31.9 percent of the jurors we interviewed said that, based on their understanding of the judge's instructions, the law "required" a death sentence if the defendant would be "dangerous in the future."

More than three out of four jurors did find that the defendant would be "dangerous in the future." This figure may reflect the tendency of jurors to underestimate how many years a defendant will serve in prison if not given a death sentence. Jurors who underestimate the severity of alternative sentences and worry about the defendant's "future dangerousness" tend to vote for death.

Similar results have also been found by our researchers in California and Florida; however one out of three California jurors knew that a defendant not sentenced to death would receive an alternative of life without parole. In South Carolina, less than 15 percent of the jurors were aware of this important fact.

To summarize, data from the Project reveals that one of the primary influences upon jury behavior in capital cases is the fear -- often based on misunderstanding -- that a defendant who does not receive a death sentence might return to society in a relatively short time and commit more crimes of violence.

This finding, which both Ted Eisenberg and Bill Bowers have reported in recently published articles, was cited by the U.S. Supreme Court in the recent case of *Simmons v. South*

*Carolina* where the Court held that it was a violation of a capital defendant's constitutional rights for the trial judge to bar the jury from receiving accurate information about alternatives to a death sentence. Although the direct effect of the decision in *Simmons* is limited to South Carolina capital cases, *Simmons* holds the promise that future Court decisions might reduce the influence of the "future dangerousness" factor upon juries.

### **Juror Responsibility for The Defendant's Fate**

Another issue that has emerged as crucial to understanding the decision-making of capital juries is the degree of responsibility that jurors feel for the fate of the defendant. Based on my interviews with jurors in Indiana, I can report that in most cases, jurors began their sentencing deliberations by discussing -- often quite emotionally -- whether they should have this responsibility at all. One juror said, "The first thing we did was everybody just collapsed literally in each others' arms and cried, knowing that we had to do that .... Somebody just said, 'What right do we have to decide if somebody should live or die?' And then we had a large discussion about that, about whether we as people had that right."

For obvious reasons, most average citizens who are pressed into service as jurors in capital cases are extremely uncomfortable with the responsibility of making a decision about whether to put a defendant to death. Jurors cope with these overwhelming feelings in a variety of ways: some try to joke about the situation or otherwise distract themselves from thinking about it; some pray in an attempt to find guidance from a higher authority; and some even turn to alcohol or other similar diversions, during the hours when they are not required to be in the courtroom.

One of the most common reactions, however, is for jurors to look to "the law" for guidance in making the sentencing decision. Even though "the law" does not actually purport to tell the jury what sentence to choose, many jurors misinterpret the trial judge's legal instructions and manage to convince themselves that "the law" dictates a certain sentencing result. This apparently allows the jurors to avoid feeling personally responsible for the sentence. As one Indiana juror described the sentencing decision, "I think it more or less was a procedure. I had a feeling [the judge] was giving us a procedure and we needed to go through these certain steps. And then if all the

pieces fit, then you have a responsibility to come back with a death sentence."

Many of the jurors we interviewed managed to avoid feeling personally responsible for the sentencing decision -- despite the fact that the trial judge directly instructed them that the sentencing decision rested in their discretion.

The avoidance of personal responsibility is even greater in those few states where the trial judge has the legal authority to override the jury's sentencing verdict; in these "judge override" states, the "individual juror" ranked last in the jury's perception of responsibility for the defendant's sentence.

At present, we cannot say whether capital jurors reach better sentencing decisions when they feel personally responsible for those decisions. However, we can speculate that avoidance of personal responsibility might have the effect of making jurors more likely to choose a death sentence; it may be easier for jurors to live with the knowledge that a defendant will be executed, based on their sentencing verdict, if they do not feel that they had freedom to choose otherwise. If this speculation is correct, then the findings of the Capital Jury Project may establish a need for our legal system to try to overcome this tendency among capital jurors.B

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